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Silence Isn't Golden: The CFPB's Privilege Rule and the Risk of Failure under Chevron Step One

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I. INTRODUCTION

On December 20, 2012 President Obama signed into law "An Act To amend the Federal Deposit Insurance Act with respect to information provided to the Bureau of Consumer Financial Protection."[1] To be clear, December 20, 2012, was the same day that House Speaker Boehner intended to push through his "Plan B" budget proposal—another salvo in the fiscal cliff budget negotiations.[2] Amidst partisan politics of the highest order, it is amazing that the lame duck Congress and the President could pass any legislation. They came together for this bill.

Although it inserts just three short lines of text into the U.S. Code, this bill saved major banks and financial institutions from the risk of serious civil exposure. Industry-wide liability could easily have been in the billions of dollars. Without this bill, there was a material risk that all documents provided to the Consumer Financial Protection Bureau (CFPB) would lose privileged status. Without this bill, banks and other regulated entities were at risk of losing their privilege claims.

For attorneys and their clients, privilege is everything.[3] It is a shield. It is comparative advantage. It is a central reason that clients hire attorneys. A company can make full disclosure to an attorney. It can communicate with candor. It can trust that it will receive concrete, specific advice in return. That does not work with an accountant, a marketing expert, a financial advisor, or a business consultant.

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1. An Act to Amend the Federal Deposit Insurance Act with Respect to Information Provided to the Bureau of Consumer Financial Protection, Pub. L. No. 112-215, 126 Stat. 1589 (2012) (to be codified at 12 U.S.C. §§ 1821, 1828).

2. Jackie Calmes & Jonathan Weisman, *Obama Pressing To Bar Tax Rise For Nearly All*, N.Y. TIMES, Dec. 22, 2012, at A2, *available at*: http://www.nytimes.com/2012/12/22/us/politics/next-move-is-obamas-after-boehners-tax-plan-fails.html?_r=0. The vote never took place as Speaker Boehner lost the support of the Republican base.

3. Discussion with Richard E. Myers II, Assoc. Dean for Student Affairs and George R. Ward Assoc. Professor of Law, UNC Sch. of Law, in Chapel Hill, N.C. (Oct. 23, 2012).

Attorneys are valuable because communications with them are privileged.[4]

Accordingly, attorneys, especially defense attorneys, pay close attention when attorney-client privilege and work-product protection are threatened. During the last decade, the Department of Justice (DOJ) began to note which companies invoked privilege during investigations. The DOJ considered this factor in its corporate charging decisions and punished companies that claimed their communications with their attorneys were privileged.[5] Anger within the bar was fevered.[6] Although this policy was later reversed, some fear it has merely become implicit.[7] The potentially chilling effect on attorney-client communication remains.[8]

In August of 2012, the Consumer Financial Protection Bureau (CFPB or Bureau) finalized a rule after notice-and-comment that purported to protect privilege for documents provided to the CFPB.[9] Beware of regulators bearing gifts. Contrary to common law, the rule stated that privileged documents given to the Bureau would still be privileged as against other parties under the selective waiver doctrine.[10] The selective waiver doctrine is not recognized at common law,[11] but banks and other regulated entities frequently provide privileged documents to prudential regulators such as the Federal Reserve Board (FRB), the Office of the Comptroller of the Currency (OCC), and the Federal Deposit Insurance Corporation (FDIC).[12] The banks generally provide these documents without being compelled in order to maintain

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4. While attorneys also add value based on their experience and legal knowledge, that value would be severely diminished without the protection of privilege.

5. *See* Liesa L. Richter, *Corporate Salvation or Damnation? Proposed New Federal Legislation on Selective Waiver*, 76 FORDHAM L. REV. 129, 139 (2007) (discussing DOJ corporate charging guidelines).

6. *See* Richter, *supra* note 5, at 143.

7. *See* Comment Letter for CFPB Proposed Rule on Confidential Treatment of Privileged Information from William. T. (Bill) Robinson III, President, Am. Bar Ass'n, to Monica Jackson, Office of the Exec. Sec'y, CFPB (Apr. 12, 2012) [hereinafter ABA Comment Letter] (on file with the American Bar Association), *available at* http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2012apr13_attorneyclient privileges_1.authcheckdam.pdf.

8. *See id.*

9. Confidential Treatment of Privileged Information, 77 Fed. Reg. 39,617 (July 5, 2012) (to be codified at 12 C.F.R. pt. 1070).

10. *See infra* Part IV.

11. *See infra* Part III.

12. *See* ABA Comment Letter, *supra* note 7, at 5.

positive relationships with their regulators. The practice is so pervasive that the issue of whether these federal regulators can compel production of privileged materials is unresolved—no bank appears to have an appetite for litigating the issue.[13] They provide these privileged documents under the protection of a statute, 12 U.S.C. § 1828(x).[14]

The CFPB's privilege rule claimed to be the equivalent of this statute.[15] However, the privilege rule issued by the CFPB may not have been valid. This is not because the rule was at odds with common law, but because it contradicted the intent of Congress. This lame-duck legislative fix was critical because the CFPB's rule to protect privilege was at risk of being struck down under *Chevron* step one.[16]

This note will demonstrate that the CFPB's privilege rule could have failed under *Chevron* analysis. Part II will give the basic framework for attorney-client privilege, work-product protection, and waiver.[17] Part III will introduce the selective waiver doctrine.[18] Next, part IV will outline the CFPB's privilege rule.[19] Part V will forecast the hypothetical judicial treatment of the CFPB's privilege rule under the *Chevron* doctrine.[20] Finally, Part VI will argue that the CFPB's privilege rule could have been struck down because Congress did not intend for the CFPB to receive selective waiver protection, and thus the rule was in jeopardy under *Chevron* step one.[21]

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13. *See* ABA Comment Letter, *supra* note 7, at 5.

14. 12 U.S.C. § 1828(x)(1) (2006) ("The submission by any person of any information to any Federal banking agency, State bank supervisor, or foreign banking authority for any purpose in the course of any supervisory or regulatory process of such agency, supervisor, or authority shall not be construed as waiving, destroying, or otherwise affecting any privilege such person may claim with respect to such information under Federal or State law as to any person or entity other than such agency, supervisor, or authority.").

15. Confidential Treatment of Privileged Information, 77 Fed. Reg. 39,617 (July 5, 2012) (to be codified at 12 C.F.R. pt. 1070).

16. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). *Chevron* provides for substantial judicial review of an agency's interpretation of its own empowering statute.

17. *See infra* Part II.

18. *See infra* Part III.

19. *See infra* Part IV.

20. *See infra* Part V.

21. *See infra* Part VI.

II. ATTORNEY-CLIENT PRIVILEGE, WORK-PRODUCT PROTECTION, AND WAIVER

A. Attorney-Client Privilege

The common law privileges have long played a central role in our justice system.[22] Foundationally, the attorney-client privilege protects communications between client and counsel.[23] This protection allows clients to speak with candor to their attorney. It enables attorneys to give precise legal advice.[24] Although there are some exceptions,[25] the attorney client privilege is jealously guarded.[26] However, the privilege is often narrowly construed in its application to prevent abuse and to encourage wider access to information within the justice system.[27]

B. Work-Product Doctrine

Offering further protection, the work-product doctrine shields documents prepared in anticipation of litigation.[28] In the seminal

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22. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) ("The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." (citing 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2290 (McNaughton Revision, 1961))).

23. *See id.*

24. *Id.* ("Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.").

25. 1 EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 637 (5th ed. 2007).

26. *Upjohn*, 449 U.S. at 389 ("[P]rivilege 'is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.'" (quoting Hunt v. Blackburn, 128 U.S. 464, 470 (1888))).

27. United States v. Tedder, 801 F.2d 1437, 1441 (4th Cir. 1986) ("We have stated repeatedly that the attorney-client privilege is to be strictly construed, in order to harmonize it, to the extent possible, with the truthseeking mission of the legal process.").

28. *See Upjohn*, 449 U.S. at 397 (citing Hickman v. Taylor, 329 U.S. 495 (1947)). While the attorney-client privilege and work product doctrine are the most commonly litigated privileges, there are other important privileges implicated by the issue of waiver. One relevant example is the bank examiner's privilege. *In re* Bankers Trust Co., 61 F.3d 465, 471 (6th Cir. 1995) ("The primary purpose of the privilege is to preserve candor in communications between bankers and examiners, which those parties consider essential to

Supreme Court case on work-product, *Hickman v. Taylor*, "the Court rejected 'an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties.'"[29] Without the work-product doctrine, careful research and preparation would be punished during discovery.[30] Despite the importance of these privileges, the federal courts treat them with some disfavor because they necessarily restrict access to information by the trier of fact, which can be contrary to the interest of justice.[31] As noted above, it is for this reason that the common law privileges are narrowly applied.[32]

C. Waiver

Another way that the courts limit the scope of privilege is through broad application of the waiver doctrine.[33] Any disclosure of privileged information to those other than the privileged parties can allow others to seek discovery of the otherwise privileged information.[34] Often, to the dismay of parties claiming privilege, judges will rule that it has been waived.[35] Waiver can be affected by simple disclosure to a

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the effective supervision of banking institutions.").

29. *See Upjohn*, 449 U.S. at 397 (citing Hickman v. Taylor, 329 U.S. 495 (1947)). While many documents are covered by both the attorney-client privilege and the work product privilege, the latter is meant specifically to protect the integrity of our adversarial system. "Discovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary." *Upjohn*, 449 U.S. at 396 (quoting Hickman v. Taylor, 329 U.S. 495, 516 (1947) (Jackson, J., concurring)).

30. *Upjohn*, 449 U.S. at 398 ("An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." (quoting Hickman v. Taylor, 329 U.S. 495, 511 (1947))).

31. *See* Herbert v. Lando, 441 U.S. 153, 175 (1979) ("Evidentiary privileges in litigation are not favored, and even those rooted in the Constitution must give way in proper circumstances."); United States v. Nixon, 418 U.S. 683, 709 (1974); Mem'l Hosp. for McHenry Cnty. v. Shadur, 664 F.2d 1058, 1061 (7th Cir. 1981).

32. *Tedder*, 801 F.2d at 1441 ("We have stated repeatedly that the attorney-client privilege is to be strictly construed, in order to harmonize it, to the extent possible, with the truthseeking mission of the legal process.").

33. *In re* Pac. Pictures Corp., 679 F.3d 1121, 1126 (9th Cir. 2012) ("[W]e recognize several ways by which parties may waive the privilege."); *see also* Hernandez v. Tanninen, 604 F.3d 1095, 1100 (9th Cir. 2010).

34. *In re Pac. Pictures Corp.*, 679 F.3d at 1126–27.

35. EPSTEIN, *supra* note 25, at 390.

third party.[36] During litigation, judges will also find a waiver if a party affirmatively relies upon documents claimed to be privileged.[37] "[I]f a client wishes to preserve the privilege, it must treat the confidentiality of attorney-client communication like jewels – if not crown jewels."[38]

III. DISCLOSURES TO THE GOVERNMENT AND THE SELECTIVE WAIVER DOCTRINE

A potential exception to waiver exists where banks or companies produce privileged documents for the government.[39] Because the government acts in the public interest, disclosure to the government should benefit the public – this weighs against waiving privilege.[40] The risk of waiver creates an incentive to withhold documents from the government. Presumably, this intransigence makes the government's public work more difficult.[41] The issue courts must weigh is whether this policy is sufficient to create an exception to waiver. This exception to privilege waiver has been labeled the "selective waiver" doctrine.[42] If the selective waiver doctrine is recognized by the bench, litigants would be allowed to selectively waive the privilege as to specific adverse government parties while maintaining privilege claims against others.[43]

The Eighth Circuit Court of Appeals was the first federal circuit court to address the issue of selected waiver, and in *Diversified Industries, Inc. v. Meredith*, it upheld the selective waiver doctrine.[44] Diversified Industries, a copper wholesaler, allegedly had agents using a slush fund to bribe purchasing employees at a brass maker named

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36. *Id.*

37. *Id.* at 508 ("The privilege, courts say repeatedly, may not be used both as a sword and as a shield in the same litigation on the same issue.").

38. *See In re* Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989) (holding that inadvertent disclosure can waive the privilege).

39. EPSTEIN, *supra* note 25, at 493. *See generally* CORPORATE COUNSEL'S GUIDE TO ATTORNEY-CLIENT, WORK-PRODUCT & SELF-EVALUATIVE PRIVILEGES §1:54 (2012) (providing further review of the selective waiver doctrine).

40. *Cf.* EPSTEIN, *supra* note 25, at 493 (alluding to the rule's good intentions).

41. *See* Permian Corp. v. United States, 665 F.2d 1214 (D.C. Cir.1981).

42. *See* EPSTEIN, *supra* note 25, at 492 n. 9 (applying the label "selective waiver" rather than "partial waiver," but declining to identify the concept as a doctrine).

43. *Id.* at 492-93.

44. Diversified Indus., Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977) (en banc).

Weatherhead.[45] Diversified hired a Washington, D.C. law firm to investigate and report back to the board of directors.[46] The firm issued a report which was discussed at Diversified's board meetings and later provided to the SEC.[47] In subsequent litigation, Weatherhead sought discovery of the report and the minutes from the board meetings.[48] Sitting en banc, the Eighth Circuit held that the documents were privileged and disclosure to the SEC did not waive Diversified's privilege claim in subsequent litigation.[49] The Eighth Circuit later affirmed this holding in *United States v. Shyres*.[50]

A. Rejection of the Selective Waiver Doctrine

Every other Circuit Court of Appeals to confront this issue after *Diversified Industries* has rejected the selective waiver doctrine.[51] Uniformly, they have found that an exception to the common law of privilege waiver was not warranted.[52] As recently as 2006, the Tenth

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45. *Id.* at 600.

46. *Id.*

47. *Id.* at 599.

48. *Id.* at 600.

49. *Id.* at 604.

50. United States v. Shyres, 898 F.2d 647, 657 (8th Cir. 1990) ("We . . . reject appellants' contention that the trial court erred in not requiring disclosure of an internal investigative report prepared by counsel . . . . The communications contained in this report were protected by the attorney-client privilege, which [appellee] did not waive by voluntarily disclosing the report to the Government . . . ." (citing *Diversified*, 572 F.2d at 611)). *But see In re* Chrysler Motors Corp. Overnight Evaluation Program Litig., 860 F.2d 844, 846 (8th Cir. 1988) ("Disclosure to an adversary waives the work product protection as to items actually disclosed, even where disclosure occurs in settlement." (quoting Grumman Aerospace Corp. v. Titanium Metals Corp. of America, 91 F.R.D. 84, 90 (E.D.N.Y.1981))); *In re* Grand Jury Proceedings, 841 F.2d 230, 234 (8th Cir. 1988) ("Voluntary disclosure is inconsistent with the confidential attorney-client relationship and waives the privilege."). These cases challenge *Diversified*. EPSTEIN, *supra* note 25, at 500. However, *Shyres* confirms *Diversified* and is more recent still.

51. *See In re* Qwest Commc'ns Int'l Inc., 450 F.3d 1179, 1185 (10th Cir. 2006); *In re* Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289 (6th Cir. 2002) (collecting cases); United States v. Massachusetts Inst. of Tech., 129 F.3d 681 (1st Cir. 1997); Genentech, Inc. v. United States Int'l Trade Comm'n, 122 F.3d 1409, 1417 (Fed. Cir. 1997); *In re* Steinhardt Partners, L.P., 9 F.3d 230 (2d Cir. 1993) (rejecting selective waiver in this case, but not adopting a bright-line rule); Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414 (3d Cir. 1991); *In re* Martin Marietta Corp., 856 F.2d 619, 623 (4th Cir. 1988); Permian Corp. v. United States, 665 F.2d 1214, 1220 (D.C. Cir. 1981).

52. An early case, Permian Corp. v. United States, rejected the rationale and holding from *Diversified*. The D.C. Circuit reasoned that the selective waiver doctrine was not justified because it did not improve the attorney-client relationship. *Permian*, 665 F.2d at 1221 ("Voluntary cooperation with government investigations may be a laudable activity,

Circuit considered the issue in the case *In re Qwest Communications Int'l Inc.*[53] The circuit panel rejected recognition of the selective waiver doctrine.[54]

Though minor, there are some differences among the circuits. The Second Circuit "decline[d] to adopt a *per se* rule that all voluntary disclosures to the government waive . . . protection."[55] However, in practice, the Second Circuit has generally rejected selective waiver claims.[56] The Southern District of New York, a judicial focal point for banking and securities litigation, has deployed the selective waiver doctrine on occasion.[57] Judges in the district have upheld privilege claims where a privilege agreement or non-waiver agreement was in place between the disclosing party and the government.[58]

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but it is hard to understand how such conduct improves the attorney-client relationship."). The *Permian* court also held that the value of encouraging cooperation with government offices was "laudable," but insufficient to justify the selective waiver doctrine. *See id.* Through the 80's, 90's, and 00's the other circuits followed in near lockstep rejecting the selective waiver doctrine. *See In re Qwest Commc'ns Int'l Inc.*, 450 F.3d at 1185; *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289 (collecting cases); *Massachusetts Inst. of Tech.*, 129 F.3d 681; *Genentech, Inc.*, 122 F.3d at 1417; *In re Steinhardt Partners, L.P.*, 9 F.3d 230 (rejecting selective waiver in this case, but not adopting a bright-line rule); *Westinghouse Elec. Corp.*, 951 F.2d 1414; *In re Martin Marietta Corp.*, 856 F.2d at 623; *Permian Corp.*, 665 F.2d at 1220.

53. *In re Qwest Commc'ns*, 450 F.3d at 1185.

54. *Id.*

55. *In re Steinhardt Partners*, 9 F.3d at 236 ("Crafting rules relating to privilege in matters of governmental investigations must be done on a case-by-case basis.") (citing Upjohn Co. v. United States, 449 U.S. 383, 396 (1981)).

56. EPSTEIN, *supra* note 25, at 497.

57. *See id.* at 505 (collecting cases); *In re Natural Gas Commodities Litig.*, 232 F.R.D. 208 (S.D.N.Y. 2005) *aff'g* 2005 WL 1457666 (S.D.N.Y. June 21, 2005) (affirming the opinion order of a magistrate judge that privilege was not waived where a confidentiality agreement was in place).

58. *See* EPSTEIN, *supra* note 25, at 505 (collecting cases). Judge Posner has presented a different analysis of the selective waiver doctrine based on forfeiture, but his opinion has yet to be widely cited. Dellwood Farms, Inc. v. Cargill, Inc., 128 F.3d 1122 (7th Cir. 1997). *But see In re Qwest Commc'ns*, 450 F.3d at 1189; EPSTEIN, *supra* note 25, at 390. *Dellwood* recasts the selective disclosure debate in terms of punitive forfeiture rather than deliberate waiver. *Dellwood*, 128 F.3d at 1127. The DOJ sought to prevent discovery of tapes from an ongoing criminal anti-trust investigation. *Dellwood* was a private civil suit; the DOJ was not a party. The DOJ claimed that a "law enforcement investigatory privilege" protected against disclosure. *Id.* This case has been cited for the proposition that selective waiver may be acceptable where a privilege agreement was in place, but that is a mischaracterization. *See* EPSTEIN, *supra* note 25, at 506. *Dellwood* actually recognizes that the true purpose behind the strict rejection of the selective waiver doctrine is to prevent parties from manipulatively using privilege. *Dellwood*, 128 F.3d at 1127 ("The reason[] [for imposing such a harsh sanction], . . . [is] a fear that selective disclosure will be used to obtain a strategic advantage . . . ."). Measuring selective disclosure in terms of forfeiture rather than waiver would achieve the policy goals behind the circuit majority's rejection of

B. *Confidentiality Agreements and Attacks on Privilege*

Because the selective waiver doctrine has been widely rejected across the Circuit Courts of Appeals, there is no reliable way to prevent waiver if privileged documents are shared with the government.[59] Still, parties often request confidentiality agreements or protective orders because it shows the disclosing party's intent to maintain privilege.[60] A few courts have cited such agreements in rejecting waiver arguments and they come at little cost.[61] However, generally speaking, attempts to cooperate with government *and* maintain privilege have failed.[62] "[C]ompanies that have turned over privileged information . . . to federal investigators have been punished by having to provide their civil adversaries with the same sensitive information."[63]

Over the past decade, the selective waiver doctrine and attorney-client privilege have been hotly contested within the bar.[64] A series of memoranda from the DOJ regarding charging guidelines for corporate entities propelled the controversy to new heights[65] – these include the original Holder Memo[66] and the superseding Thompson Memo.[67] In these memos, the DOJ announced and reconfirmed that in making charging decisions it would consider whether corporations waived privilege claims during investigations.[68] As the DOJ pushed more

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the doctrine while allowing for rarer cases where a countervailing policy is present. In *Dellwood*, the countervailing policy was prosecutorial discretion. *Id.* at 1125.

59. EPSTEIN, *supra* note 25, at 493 ("The fond and all but invariably futile hope of the disclosing party is to be allowed to make such selective waiver without thereby losing the protection of the privilege in respect to the rest of the world.").

60. *Id.*

61. *Id.* at 504.

62. Richter, *supra* note 5, at 133 (citing *In re Qwest Commc'ns*, 450 F.3d 1179).

63. *Id.*

64. *Id.* at 143 n.52.

65. *Id.*

66. Memorandum from Eric H. Holder, Jr., Deputy Att'y Gen., to All Component Heads and U.S. Att'ys (June 16, 1999) [hereinafter Holder Memo], *available at* http://www.justice.gov/criminal/fraud/documents/reports/1999/charging-corps.PDF (describing the factors considered by the government when deciding whether to bring criminal charges against a corporation).

67. Memorandum from Deputy Att'y Gen. Larry Thompson to Heads of Dep't Components and U.S. Att'ys (Jan. 20, 2003) [hereinafter Thompson Memo], *available at* http://www.justice.gov/dag/cftf/business_organizations.pdf (describing the factors considered by the government when deciding whether to bring criminal charges against a corporation).

68. *Id.*

companies to waive privilege, the risk of waiver to other parties increased, and the desirability of using the selective waiver doctrine increased as well. "[A]s federal authorities have increasingly emphasized 'authentic cooperation' by corporate targets . . . circuit courts have gradually lined up to reject waiver protection for those companies in third-party civil litigation. Companies are increasingly finding themselves caught between the 'rock' of federal investigation and the 'hard place' of increased civil exposure."[69]

C. *Failed Attempt at Universal Selective Waiver Protection*

Efforts to codify the selective waiver doctrine were unsuccessful. Amidst this atmosphere of government pressure-induced waiver, the organized bar was vocal in calling for statutory or rule changes to protect the attorney-client privilege and work-product doctrine.[70] A new Federal Rule of Evidence, 502, was proposed in 2006 in response to the outcry.[71] It included a specific exception providing that a "voluntary disclosure does not operate as a waiver if . . . the disclosure is made to a federal, state, or local governmental agency during an investigation by that agency, and is limited to persons involved in the investigation."[72] The proposed rule was not adopted because the groups lobbying for it reversed course at the last minute.[73] They felt emboldened and believed they could get even stronger language passed.[74] They were wrong.

D. *Statutory Selective Waiver Protection for Banks*

In contrast, banks and other regulated financial entities had more success gaining selective waiver protection. In 2006, Congress passed an omnibus financial regulation reform bill, the Financial

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69. Richter, *supra* note 5, at 155.

70. EPSTEIN, *supra* note 25, at 493.

71. Richter, *supra* note 5, at 155.

72. EPSTEIN, *supra* note 25, at 493.

73. Richter, *supra* note 5, at 133 ("On the verge of obtaining the [selective waiver] protection they have long sought through this proposed evidence rule, corporate counsel did a surprising about-face and formed a broad coalition opposing the proposal. This coalition claims that selective waiver would perpetuate and endorse a 'culture of waiver' that has evolved in connection with federal investigations.") (footnote omitted).

74. *Id.*

Services Regulatory Relief Act of 2006.[75] Banks and thrifts lobbied for Section 607, titled "Nonwaiver of Privileges."[76] Codified at 12 U.S.C. § 1828(x), this provision allowed banks and regulated entities to provide otherwise privileged documents to "[f]ederal banking agencies" without waiving privilege claims against third-party litigants in subsequent actions.[77] The FRB and the OCC both had representatives testify before Congress in support of this statute.[78]

E. Statutory Selective Waiver Protection Not Extended to the CFPB

The selective waiver statute only applies to federal banking agencies. The federal banking agencies are enumerated by statute for the purpose of applying section 1828(x) and other provisions of Chapter 12 of the U.S. Code.[79] In 2006, when the reform bill was passed, the list of federal banking agencies included the OCC, the FRB, the FDIC, and the Office of Thrift Supervision (OTS).[80] This section was later revised by the Dodd-Frank Act to strike the OTS from the list.[81] If the Dodd-Frank Act had added the CFPB to the statutory list of federal banking agencies, then the "nonwaiver" protection afforded to regulated entities under section 1828(x) would also have been extended to entities regulated by the CFPB and the privilege rule would have been unnecessary.[82] However, including the CFPB as a federal banking agency would also give the Bureau many other powers previously

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75. Financial Services Regulatory Relief Act of 2006, Pub. L. No. 109-351, 120 Stat. 1966.

76. Audrey Strauss, *Selective Waiver for the Banking Industry*, N.Y.L.J., Mar. 1, 2007, *available at* http://friedfrank.com/siteFiles/Publications/CD0FD9CFC111EB73E66F47FC6752E7E4.pdf

77. 12 U.S.C. § 1828(x) (2006). A mirror provision was codified at 12 U.S.C. § 1785(j) for the provision of documents to the National Credit Union Administration (NCUA). 12 U.S.C. § 1785(j) (2006).

78. *Consideration of Regulatory Relief Proposals: Hearing before the S. Comm. on Banking, Hous., and Urban Affairs*, 109th Cong. 8, 11 (2006) (statements of Donald Kohn, Member, Board of Governors of the Federal Reserve System, and Julie Williams, First Senior Deputy Comptroller and Chief Counsel, Office of the Comptroller of the Currency).

79. 12 U.S.C. § 1813(z) (2006).

80. *Id.*

81. Dodd-Frank Wall Street Reform and Consumer Protection Act § 363, Pub. L. No. 111-203, 124 Stat. 1376, 1550 (2010).

82. *See* ABA Comment Letter, *supra* note 7, at 5-6.

reserved for the prudential regulators.[83] Dodd-Frank did not add the CFPB to the list of federal banking agencies to which the section 1828(x) protections were extended.

Separate from section 1828(x), there are provisions in the Dodd-Frank Act entitled "Retention of Privilege," but they do not cover the CFPB.[84] They provide protection similar to section 1828(x) for disclosures made to the Financial Stability Oversight Committee (FSOC), the Office of Financial Research, and the Federal Insurance Office, but not the CFPB.[85] These provisions provide that the "submission of any nonpublicly available data or information [to each respective office] shall not constitute a waiver of, or otherwise affect, any privilege arising under Federal or State law (including the rules of any Federal or State court) to which the data or information is otherwise subject."[86]

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83. *See e.g.* 12 U.S.C. § 1818(e) (2006) (granting the power to remove and prohibit officers from the banking industry); 12 U.S.C. § 1818(i) (2006) (granting the power to assess civil money penalties).

84. 12 U.S.C. § 5322(d)(5)(B) (Supp. IV 2010) (covering the Financial Stability Oversight Council and the Office of Financial Research); 31 U.S.C. § 313(e)(5)(A) (Supp. IV 2010) (covering the Office of National Insurance (now Federal Insurance Office)). The Dodd-Frank Wall Street Reform and Consumer Protection Act created two new independent agencies: Financial Stability Oversight Committee, 12 U.S.C § 5321 (Supp. IV 2010); Bureau of Consumer Financial Protection, 12 U.S.C. § 5491 (Supp. IV 2010). It also created nine new subordinate offices: (1) Office of Financial Research in the Department of the Treasury, 12 U.S.C. § 5342 (Supp. IV 2010); (2) Office of National Insurance (Federal Insurance Office) in the Department of the Treasury, 31 U.S.C. § 313 (Supp. IV 2010); (3) Office of Credit Ratings in the Securities and Exchange Commission, 15 U.S.C. § 78o-7(p)(1) (Supp. IV 2010); (4) Council of Inspectors General on Financial Oversight, Dodd-Frank Wall Street Reform and Consumer Protection Act § 989E, Pub. L. No. 111-203, 124 Stat. 1376, 1946, *reprinted in* 5 U.S.C. app § 11 (Supp. IV 2010); (5) Office of Fair Lending and Equal Opportunity in the Bureau of Consumer Financial Protection, 12 U.S.C. § 5493 (Supp. IV 2010); (6) Office of Financial Education in the Bureau of Consumer Financial Protection, 12 U.S.C. § 5493 (Supp. IV 2010); (7) Office of Service Member Affairs in the Bureau of Consumer Financial Protection, 12 U.S.C. § 5493 (Supp. IV 2010); (8) Office of Financial Protection for Older Americans in the Bureau of Consumer Financial Protection, 12 U.S.C. § 5493 (Supp. IV 2010); (9) Office of Housing Counseling in the Department of Housing and Urban Development, 42 U.S.C. § 3533 (Supp. IV 2010). Dodd-Frank also closed one independent agency by merging the OTS with the OCC. 12 U.S.C. § 5401 (Supp. IV 2010).

85. *See* 12 U.S.C. § 5322(d)(5)(B) (Supp. IV 2010) (covering the Financial Stability Oversight Council and the Office of Financial Research); 31 U.S.C. § 313(e)(5)(A) (Supp. IV 2010) (covering the Office of National Insurance (now Federal Insurance Office)).

86. 12 U.S.C. § 5322(d)(5)(B) (Supp. IV 2010) (covering the Financial Stability Oversight Council and the Office of Financial Research); 31 U.S.C. § 313(e)(5)(A) (Supp. IV 2010) (covering the Office of National Insurance (now Federal Insurance Office)).

F. The Dodd-Frank Act and the Creation of the CFPB

1. Creation of the CFPB

Congress created the CFPB in response to widespread abuse in the consumer finance marketplace.[87] The Bureau has drawn an aggressive reputation for some of its early civil fines.[88] The CFPB's first director, Richard Cordray, was selected by President Obama amidst controversy over the constitutionality of the recess appointment.[89] "The [creation of the Bureau] significantly alter[ed] the consumer financial protection landscape by consolidating rulemaking authority and, to a lesser extent, supervisory and enforcement authority in one regulator—the CFPB."[90]

2. The CFPB's Regulatory Jurisdiction

The Bureau's primary jurisdiction covers two types of entities subject to federal consumer finance laws: depository and non-depository institutions.[91] Depository institutions, including banks, thrifts, and credit unions, are further divided by a total assets benchmark of $10 billion or more.[92] The CFPB is charged with the supervision and enforcement of compliance with the federal consumer finance laws.[93] It

87. 12 U.S.C. § 5491 (Supp. IV 2010). The CFPB is referred to as the Bureau of Consumer Financial Protection in the Dodd-Frank Act.

88. *See* Carter Dougherty and Jesse Hamilton, *American Express to Pay $112.5 Million over Credit-Card Add-ons*, BLOOMBERG NEWS, Oct. 1, 2012, *available at* http://www.bloomberg.com/news/2012-10-01/american-express-to-pay-112-5-million-over-credit-card-a.html; Carter Dougherty and Dakin Campbell, *Capital One to Pay $210 Million in First CFPB Enforcement*, BLOOMBERG NEWS, July 18, 2012, *available at* http://www.bloomberg.com/news/2012-07-18/capital-one-to-pay-210-million-in-first-cfpb-enforcement-case.html; Carter Dougherty, *Discover to Keep Selling Card Add-ons in Wake of U.S. Penalties*, BLOOMBERG NEWS, Sep. 24, 2012, *available at* http://www.bloomberg.com/news/2012-09-24/discover-to-keep-selling-card-add-ons-in-wake-of-u-s-penalties.html.

89. Hans Nichols and Laura Litvan, *Obama Installs Richard Cordray as Consumer Head in Defiance of Republicans*, BLOOMBERG NEWS, Jan. 4, 2012, *available at* http://www.bloomberg.com/news/2012-01-04/obama-said-to-name-cordray-as-consumer-bureau-chief-in-recess-appointment.html.

90. DAVID H. CARPENTER, CONG. RESEARCH SERV., R42572, THE CONSUMER FINANCIAL PROTECTION BUREAU (CFPB): A LEGAL ANALYSIS 9 (2012).

91. 12 U.S.C. §§ 5514, 5515 (Supp. IV 2010).

92. *Id.* at § 5515.

93. 12 U.S.C. §§ 5515, 5516 (Supp. IV 2010).

has primary jurisdiction over institutions with more than $10 billion in assets, but only limited jurisdiction over institutions below that threshold.[94] The Bureau has identical supervisory and enforcement powers over non-depository entities such as payday lenders, mortgage loan originators and servicers, private education loan providers, and private debt collectors, as well as any entity apprehended via its own consumer complaint system.[95] Major federal consumer finance laws overseen by the Bureau include the Truth in Lending Act (TILA), the Equal Credit Opportunity Act (ECOA), Real Estate Settlement Procedures Act of 1974 (RESPA), and the Fair Debt Collection Practices Act (FDCPA).[96]

3. The CFPB's Regulatory Powers

Relevant to the issue of privilege and waiver, the CFPB has been entrusted with strong oversight powers equivalent to that of the prudential regulators (OCC, FRB, FDIC, and the National Credit Union Administration (NCUA)).[97] For example, an OCC examiner has the "power to make a thorough examination of all the affairs of the bank . . . . [H]e shall have power to administer oaths and to examine any of the officers and agents thereof under oath."[98] The Supreme Court recently discussed the genesis and the scope of supervisory powers and found them very broad, analogizing them to a king's right to visit and inspect any corporation.[99] While banks and other depositories are accustomed to this level of scrutiny, the CFPB has the power to deploy the same oversight upon non-depository businesses.[100] These businesses have not dealt with frequent regulatory examination by a federal agency before. Critical to the issue of privilege and waiver, the Dodd-Frank Act extended to the CFPB comparable document access enjoyed by the prudential regulators, but did not extend the selective waiver protection of 12 U.S.C. § 1828(x).

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94. *Id.* at § 5515.
95. *Id.* at § 5514.
96. Carpenter, *supra* note 90, at 3, 24 (listing acts).
97. 12 U.S.C. §§ 5514, 5515, 5581 (Supp. IV 2010).
98. *Id.* at § 481 (Supp. IV 2010).
99. Cuomo v. Clearing House Ass'n, L.L.C., 557 U.S. 519, 525 (2009).
100. 12 U.S.C. § 5514.

4. Important Provisions of the Dodd-Frank Act

The Dodd-Frank Act also empowered the CFPB to engage in rulemaking.[101] This general grant of rulemaking authority is important because it signals to courts a higher level of congressional delegation of authority, which entails greater deference.[102] Dodd-Frank also provided the CFPB with a specific grant of rulemaking authority regarding confidentiality: "The Bureau shall prescribe rules regarding the confidential treatment of information obtained from persons in connection with the exercise of its authorities under Federal consumer financial law."[103]

IV. THE CFPB'S PRIVILEGE RULE

The CFPB issued its privilege rule in order to ease industry concerns of waiver. The Dodd-Frank Act empowered the CFPB to access proprietary and privileged documents, but did not extend selective waiver protection.[104] When Congress was considering the selective waiver statute in 2006, the OCC and FRB favored it because it would smooth relations with depository institutions.[105] The rejection of the selective waiver doctrine in the Circuit Courts is no boon to regulators because regulated parties have a reason to be less forthcoming: the risk of civil exposure.[106] This benefit accrues to the plaintiff's bar.[107] This risk was noted by the defense bar and entities falling within the CFPB's newly minted jurisdiction.[108]

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101. 12 U.S.C. § 5512(b)(1) (Supp. IV 2010). ("The Director may prescribe rules and issue orders and guidance, as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent the evasions thereof.").

102. *See infra* Part IV.B. *See also* RICHARD J. PIERCE, JR., ADMIN. LAW TREATISE § 6.2 at 408 (5th ed. 2010) ("An agency has the power to issue binding legislative rules only if and to the extent Congress has granted it the power to do so.").

103. 12 U.S.C. § 5512(c)(6)(A) (Supp. IV 2010).

104. *See supra* Part III.E.

105. *Consideration of Regulatory Relief Proposals: Hearing before the Subcomm. on Banking, Hous., and Urban Affairs*, 109th Cong. (2006) (comments from Donald Kohn (FRB) and Julie Williams (OCC)).

106. *See* Richter, *supra* note 5, at 133.

107. *See In re* Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289 (6th Cir. 2002); *In re* Qwest Commc'n Int'l Inc., 450 F.3d 1179, 1185 (10th Cir. 2006).

108. *See* Kevin L. Petrasic and Michael A. Hertzberg, *CFPB Makes the Case for Supervisory Examination Privilege*, PAUL HASTINGS LLP (Jan. 19, 2012),

A. *Privilege Protection and CFPB Bulletin 12-01*

Originally, the CFPB did not think a notice-and-comment rule was necessary to protect privilege claims. In response to industry concerns, the CFPB issued Bulletin 12-01 on January 4, 2012.[109] In the bulletin, the Bureau explained why its statutory grant of jurisdiction included the power to compel production of documents regardless of privilege claims.[110] Further, the CFPB determined that the provision of privileged documents to its officers by regulated entities did not waive privilege claims.[111] The bulletin provided dual rationales. First, because supervisory requests demand mandatory compliance, the provision of documents is not voluntary and therefore there is no waiver.[112] Second, the bulletin explains that the selective waiver statute, 12 U.S.C. § 1828(x), does apply to the CFPB via a "transfer of powers" statute in Dodd-Frank.[113] Perhaps, because these rationales were found not compelling, the CFPB elected to issue a new rule protecting privilege via notice and comment rulemaking.

B. *Notice and Comment Rule Protecting Privilege*

The Bureau issued a proposed rule in March 2012 for notice and comment titled "Privileges not affected by disclosures to the CFPB."[114] The rule provided that "[t]he submission by any person of any information to the CFPB for any purpose in the course of any supervisory or regulatory process of the CFPB shall not be construed as waiving, destroying, or otherwise affecting any privilege such person

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http://www.paulhastings.com/publicationdetail.aspx?publicationId=2090.

109. CONSUMER FIN. PROT. BUREAU, CFPB BULL. 12-01, THE BUREAU'S SUPERVISION AUTHORITY AND TREATMENT OF CONFIDENTIAL SUPERVISORY INFORMATION (2012), *available at* http://files.consumerfinance.gov/f/2012/01/GC_bulletin_12-01.pdf.

110. *See id.* at 1-2.

111. *See id.* at 2 ("[T]he provision of information to the Bureau pursuant to a supervisory request would not waive any privilege that may attach to such information.").

112. *See id.* at 2 ("[B]ecause entities must comply with the bureau's supervisory requests for information, the provision of privileged information to the Bureau would not be considered voluntary and would thus not waive any privilege that attached to such information.") (citing Boston Auction Co. v. Western Farm Credit Bank, 925 F. Supp. 1478 (D. Hawaii 1996)).

113. *See id.* at 2-3; 12 U.S.C. § 5581 (Supp. IV 2010).

114. Confidential Treatment of Privileged Information, 77 Fed. Reg. 15,286, 15,287 (proposed March 15, 2012) (to be codified at 12 C.F.R. pt. 1070).

may claim with respect to such information under Federal or State law as to any person or entity other than the CFPB."[115] The Bureau's explanation stated that the rule was intended to parallel the selective waiver statute covering the prudential regulators in section 1828(x).[116]

It is important to note an agency's statutory justification when it issues a rule because a reviewing court can only consider the authority originally cited by an agency.[117] They will not entertain new arguments first provided in court.[118] As statutory justification for its authority to issue this rule, the Bureau cited its general rulemaking authority,[119] and its specific rulemaking authority over the confidential treatment of information obtained during the course of its work.[120]

C. *Public Comments and the Final Rule*

Most comment letters submitted were from parties subject to CFPB jurisdiction and industry lobbying organizations.[121] Generally, these letters supported the Bureau's policy goal to gain selective waiver protection, but they questioned the rule's legal viability.[122] They urged congressional action to protect privileged documents by statute.[123]

By far, the most detailed and challenging comment letter came

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115. *Id.* at 15,291.

116. *Id.* at 15,287 ("This rule is substantively identical to the statutory provisions that apply to the submission of privileged information to the prudential regulators, [s]tate bank and credit union supervisors, and foreign banking authorities in the course of their supervisory or regulatory processes.") (footnote omitted).

117. *See* SEC v. Chenery Corp., 318 U.S. 80, 95 (1943) ("We merely hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained.").

118. *See id.*

119. 12 U.S.C. § 5512(b)(1) (Supp. IV 2010).

120. 12 U.S.C. § 5512(c)(6)(A) (Supp. IV 2010).

121. *See, e.g.*, Comment Letter from Mary Mitchell Dunn, Deputy Gen. Counsel, Credit Union Nat'l Ass'n (CUNA), to Monica Jackson, Office of the Exec. Sec'y, CFPB (Apr. 16, 2012) [hereinafter CUNA Comment Letter]; Comment Letter from Stephen O'Connor, Senior Vice President, Mortg. Bankers Ass'n (MBA), to Monica Jackson, Office of the Exec. Sec'y, CFPB (Apr. 16, 2012) [hereinafter MBA Comment Letter]; Comment Letter from Carl V. Howard, Deputy Gen. Counsel, Citigroup Inc., to Monica Jackson, Office of the Exec. Sec'y, CFPB (Apr. 16, 2012) [hereinafter Citigroup Comment Letter].

122. *See* CUNA Comment Letter, *supra* note 121; MBA Comment Letter, *supra* note 121; Citigroup Comment Letter, *supra* note 121.

123. *See* CUNA Comment Letter, *supra* note 121; MBA Comment Letter, *supra* note 121; Citigroup Comment Letter, *supra* note 121.

from the American Bar Association (ABA).[124] The ABA outlined its longstanding opposition to government policies that pressure individuals and companies to waive privilege claims.[125] This included the DOJ's decision to replace the Holder and Thompson memoranda[126] with purportedly less aggressive policies that do not pressure the targets of investigations to waive privilege claims.[127]

Although not specifically part of the Bureau's proposed rule, the ABA rebutted the CFPB Bulletin 12-01 claim that the Bureau has the power to compel production of privileged documents.[128] The ABA argued that the prudential regulators lack this power and that, at best, the issue is unsettled.[129] It then leveraged this conclusion to criticize the Bureau's privilege rule. The ABA argued that courts will find submissions to the CFPB to be non-mandatory and thus constitute a waiver of privilege.[130]

The credibility of the ABA's argument is uncertain because it would be difficult to prove that the prudential regulators cannot compel the production of privileged materials. The prudential regulators have long claimed the power to access privileged documents as part of their supervisory powers.[131] This issue has not been clearly settled in the courts and it is unlikely to be settled in the near future – the parties are not interested in litigating the issue. However, in *Cuomo v. Clearing House Ass'n, L.L.C.*,[132] the Supreme Court suggests the supervisory power entrusted to the prudential regulators is very broad.[133] A court that upholds the power of the prudential regulators to seek privileged documents would have a very difficult time ruling that the same power

124. *See* ABA Comment Letter, *supra* note 7.

125. *Id.* at 2.

126. See *supra* Part III.B.

127. ABA Comment Letter, *supra* note 7, at 2.

128. *Id.* at 4-6.

129. *Id.*

130. *Id.* at 8-9.

131. OCC, OFFICE OF DEPUTY CHIEF COUNSEL, INTERPRETIVE LETTER, 1991 WL 338409 (Dec. 3, 1991); *Coordination and Information Sharing Among Financial Institution Regulators: Hearing Before the H. Subcomm. on Gen. Oversight and Investigations and on Fin. Inst. and Consumer Credit of the H. Comm. on Fin. Services,* 102nd Cong. (1991) (statement of Julie Williams, First Senior Deputy Comptroller and Chief Counsel, OCC); *OCC's Examiner's Handbook*, OFF. COMPTROLLER CURRENCY (Feb. 2000), *available at* http://www.occ.gov/publications/publications-by-type/comptrollers-handbook/litgtn.pdf.

132. Cuomo v. Clearing House Ass'n, 557 U.S. 519 (2009).

133. *Id.*

does not extend to the CFPB; the Dodd-Frank Act's "transfer of powers" provision is explicit on this point.[134]

Furthermore, the ABA's argument might have been litigiously imprudent because, as outlined below, the CFPB's rule may fail under *Chevron* step one. Despite criticism from industry and the ABA, the CFPB's final rule was unaltered and became effective August 6, 2012.[135] The rule has not allayed the concerns of industry or the defense bar.[136]

V. ANTICIPATED JUDICIAL TREATMENT OF THE CFPB'S PRIVILEGE RULE

The exact circumstances under which the CFPB's privilege rule might have been challenged are not certain, but there are two predictable scenarios. First, an entity regulated by the CFPB may bring suit *after* a Bureau request for privileged information. Second, a civil plaintiff could challenge the rule in a discovery dispute attempting to compel an entity regulated by the CFPB to produce privileged materials previously provided to the Bureau. The justiciability issues for each scenario are discussed below.

A. Justiciability Issues and Legal Scenarios Challenging the Rule

First, if the CFPB requested privileged documents from a regulated entity, such as a very large bank or a payday lender, that party could bring suit challenging the privilege rule.[137] However, many companies would be wary about suing the CFPB out of concern of souring an important regulatory relationship.[138] Even though the

134. 12 U.S.C. § 5581 (Supp. IV 2010).

135. Confidential Treatment of Privileged Information, 77 Fed. Reg. 39,617 (July 5, 2012) (to be codified at 12 C.F.R. pt. 1070).

136. Kate Berry, *CFPB's Rule on Attorney-Client Privilege Raises Concerns*, A.M. BANKER, Oct. 12, 2012, *available at* http://www.americanbanker.com/issues/177_197/cfpb-rule-on-attorney-client-privilege-raises-concerns-1053420-1.html.

137. *See* Abbott Labs v. Gardner, 387 U.S. 136 (1967). Prior to *Abbott Laboratories*, agency rules could only be challenged in the context of concrete cases under the Const. Art. III standard for cases and controversies. However, the *Abbott Laboratories* Court recognized that regulated entities faced a great deal of risk in determining whether to comply with arguably invalid rules. Furthermore, fear of agency enforcement action or license suspension tended to prevent controversies from coming before the courts. The Supreme Court ruled that substantive review could be had pre-enforcement, so long as minimal standards of justiciability were met.

138. Arguably, it is counter-productive for a bank to challenge this rule because the rule

CFPB's privilege rule is now final, suing before the CFPB requests any privileged documents would lead to dismissal for non-justiciability.[139]

Alternatively, the rule could be challenged in a discovery dispute without the CFPB as a party. A regulated entity could comply with a CFPB request for privileged documents. Later, if the same entity is sued, the civil plaintiff could seek production of those privileged documents and argue that privilege claims were waived when the documents were provided to the CFPB. The regulated entity could point to the CFPB's privilege rule to claim privilege was not waived. The court would be forced to determine whether the privilege rule was valid.

B. The Chevron Doctrine

Agency rules will be found invalid if they contradict a statutory provision. Under the Administrative Procedure Act (APA) § 706(2)(A), "[t]he reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be . . . *not in accordance with law*."[140] This is the statutory fountainhead of the *Chevron* doctrine.[141]

Agencies must act within the statutory bounds provided by Congress.[142] The APA provides that where an agency action, including a notice-and-comment rule, strays outside statutory bounds, it must be ruled "not in accordance with law" and overturned.[143] Applying this section of the APA, the *Chevron* Doctrine allows for substantive review of agency actions, but affords great deference to agency decisions. From the original *Chevron* case, the doctrine provides:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two

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provides the bank with greater protection. However, uncertainty over the rule's validity could materially alter how a regulated entity deals with the CFPB. If the rule is invalid, banks will be more careful about what documents they provide to the CFPB and what documents they provide willingly.

139. *See Abbott Labs.*, 387 U.S. 136; Nat'l Park Hospitality Ass'n v. Dep't of Interior, 538 U.S. 803 (2003) (showing the modern application of this principle).

140. Administrative Procedure Act § 706, 5 U.S.C. § 706 (2006) (emphasis added).

141. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

142. *Id.* at 842-843 ("The judiciary . . . must reject administrative constructions which are contrary to clear congressional intent.") (citations omitted).

143. 5 U.S.C. § 706 (2006).

> questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[144]

1. *Chevron* Step One

"First, always, is the question whether Congress has directly spoken to the precise question at issue."[145] In this case, the precise question is apparent: Did Congress intend for privileged documents provided to the CFPB to be protected by the selective waiver doctrine? Determining whether Congress has *directly* addressed this issue is more difficult. Reasonable people disagree on how to measure congressional intent.[146] The *Chevron* Court directed that courts should use "traditional tools of statutory construction [to determine whether] Congress had an intention on the precise question at issue."[147] The Court relied on statutory analysis[148] and legislative history,[149] but ultimately found that neither method led to a clear view of congressional intent in that case.

Critically, there are divergent views on the Court as to which traditional tools of statutory construction may be used and how they

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144. *Chevron*, 476 U.S. at 842-843 (footnotes omitted).

145. *Id.* at 842.

146. *See* Richard A. Posner, *The Incoherence of Antonin Scalia*, THE NEW REPUBLIC, Aug. 24, 2012, *available at* http://www.newrepublic.com/article/magazine/books-and-arts/106441/scalia-garner-reading-the-law-textual-originalism.

147. *Chevron*, 476 U.S. at 842-843.

148. *Id.* at 861 ("We are not persuaded that parsing of general terms in the text of the statute will reveal an actual intent of Congress.").

149. *Id.* at 862 ("Based on our examination of legislative history, we agree with the Court of Appeals that it is unilluminating.").

may be deployed to divine congressional intent.[150] The most popular tools of statutory construction[151] are plain meaning,[152] legislative history,[153] and the canons of construction.[154] Each method has been savaged twice as many times as it has been lauded. This note eschews any attempt to adjudicate between the most popular methods of statutory interpretation. Strict rules do not necessarily organize all available sources to best illuminate congressional intent.[155] Instead, this note makes use of a single, frequently deployed canon of construction to show that Congress did not intend for the CFPB to have selective waiver protection.

2. *Chevron* Step Two

If a court finds that Congress has not directly spoken to the

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150. PIERCE, *supra* note 102, at 237 (noting that "the widely differing way in which the Justices define and apply 'traditional tools of statutory construction' helps to highlight the importance of the as yet unresolved debate among the Justices concerning the meaning of the *Chevron* test. If reviewing courts are free to use any combination of the 'traditional tools of statutory construction' they choose in the process of applying *Chevron* step one, few if any cases will reach *Chevron* step two. It is the very indeterminacy of the 'traditional tools' that gives judges the discretion to make policy decisions through the process of statutory construction.").

151. *See id.* at 228 (providing a survey of common methods with diverse examples where each one is deployed to the exclusion of the other methods).

152. Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231 (1990).

153. Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992).

154. *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395 (1949-1950) (criticizing the flexible diversity of the canons of construction). Pierce also suggests congressional purpose is a valid doctrine to determine congressional intent. *See* PIERCE, *supra* note 102, at 228 (citing HART & SACKS, THE LEGAL PROCESS 1148-1179 (10th ed. 1958) (unpublished book)). This may be incorrect because the D.C. Circuit relied upon congressional purpose in its decision that was ultimately struck down by the Supreme Court. *See* Natural Res. Def. Council, Inc. v. Gorsuch, 685 F.2d 718, 720 (D.C. Cir. 1982), *overruled by* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

155. The individuals evaluating *Chevron* arguments over statutory construction are among the most sophisticated minds in the law. While strict standards of statutory construction may constrain judges from injecting personal politics, the people scrutinizing judicial decisions are imminently well prepared to determine whether congressional intent has been abandoned as a guidepost. This is true regardless of whether strict rules are obeyed. *Cf.* CHARLES H. KOCH, JR., 2 ADMIN L. PRAC. § 5.52 (3rd ed. 2012) ("A soft approach to the rules of evidence has developed [in administrative law] because the rules of evidence are designed to protect unsophisticated members of a jury and hence are not appropriate for hearings in which the trier of fact is sophisticated and usually expert in the area of the factual controversy.").

precise issue, the analysis shifts to *Chevron*'s second step.[156] This merely asks whether the agency's statutory interpretation is reasonable.[157] It need not be preferable, merely reasonable.[158] Very few agency rules or adjudications fail at step two.[159] This note will not reach *Chevron* step two analysis because the CFPB's privilege rule likely fails under step one.

VI. THE CFPB'S PRIVILEGE RULE LIKELY FAILS UNDER *CHEVRON* STEP ONE

When challenged, the CFPB's privilege rule could fail under *Chevron* step one, but the issue is not conclusive. On one hand, the Bureau was specifically empowered to create rules regarding the confidential treatment of information it obtained. This could be sufficient for the CFPB to prevail. On the other hand, there is also evidence to suggest that Congress has directly spoken to this precise issue and did not intend for privileged documents provided to the CFPB to be protected by the selective waiver doctrine. Congress provided two selective waiver provisions in Dodd-Frank for new agencies and offices; it did not provide a selective waiver provision covering the CFPB.[160] This could be sufficient to find clear congressional intent.

A. Confidential Treatment of Information

The Bureau maintains that Congress intended for the Bureau to issue rules to protect confidence. This contention cannot be dismissed. It cites Congress's statutory directive to "prescribe rules regarding the confidential treatment of information obtained from persons in connection with the exercise of its authorities under Federal consumer

156. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.") (footnote omitted).

157. *Id.* ("The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.").

158. *Id.*

159. *Cf.* PIERCE, *supra* note 102, at 228 (discussing the low standard imposed by *Chevron* step two).

160. 12 U.S.C. § 5322 (Supp. IV 2010); 31 U.S.C. § 313(e)(5)(A) (Supp. IV 2010).

financial law."[161] The Bureau's rule does support the confidential treatment of information obtained pursuant to the Bureau's regulatory authority. A judge performing a *Chevron* analysis could reasonably conclude that Congress had rules similar to the CFPB's new rule in mind when it drafted this provision and Congress specifically intended for the Bureau to issue these rules. This would validate the privilege rule under *Chevron*. However, while impossible to ignore, this conclusion is not the only reasonable interpretation.

First, the statute is concerned with the "confidential treatment of information." This is different from "the treatment of confidential information." This distinction suggests Congress was concerned about the Bureau's responsible handling of the information it collected. This concern would not be specific to confidential or privileged information. It would apply to everything collected by the Bureau. This specific provision is not about privilege and waiver. It is about ensuring the Bureau adequately protects the information it collects.

This interpretation is supported by a portion of the legislative history: a failed amendment from the House of Representatives. In an amendment offered by Rep. Walter Minnick of Idaho, this statutory provision was two sentences long rather than just one.[162] The statute currently reads: "The Bureau shall prescribe rules *regarding the confidential treatment of information obtained from persons in connection with the exercise of its authorities* under Federal consumer financial law."[163] The amendment read: "The Council, the Financial Institutions Examination Council, the [CFPB], and the consumer protection agencies shall each issue regulations *regarding the confidential treatment of information obtained from persons in connection with the exercise of such entity's authorities* under this title. Such regulations shall, to the extent practicable, mirror the provisions provided for the confidential treatment of financial records under the Right to Financial Privacy Act of 1978 (12 U.S.C. § 3401)."[164] The statute referenced in the amendment, 12 U.S.C. § 3401, dictates rules concerning the protection of consumer financial information in the supervisory process, not privileged corporate documentation. The

161. 12 U.S.C. § 5512(c)(6)(A) (Supp. IV 2010).
162. 155 Cong. Rec. H14,764, 14,772 (daily ed. Dec. 11, 2009).
163. 12 U.S.C. § 5512(c)(6)(A) (Supp. IV 2010) (emphasis added).
164. 155 Cong. Rec. H14,770 (daily ed. Dec. 11, 2009) (emphasis added).

amendment passed a voice vote before it was permanently tabled.[165]

Unfortunately for the sake of conclusive analysis, there are colorable arguments for each competing interpretation of this provision. When arguments balance under *Chevron*'s first step, courts will find the issue inconclusive or ambiguous.[166] However in this case, there is more evidence to help demonstrate congressional intent under *Chevron* step one.

B. Russello Presumption and Congressional Intent

1. *Russello* Presumption

If Congress intended for the CFPB to have selective waiver protection, it would have provided it within the Dodd-Frank Act. Instead, Congress provided such protection to other agencies and offices created in the same bill.[167] "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[168] In this case, Congress's omission is sufficient to demonstrate congressional intent.

2. *Russello* Presumption and *Chevron* Step One

The *Russello* presumption is a valid canon of construction to demonstrate congressional intent under *Chevron* step one. The United States Supreme Court has deployed this rule of construction four times in the first half of the 2012 calendar year; this shows that the rule is canonical.[169] Furthermore, it is often cited to address similar facts to

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165. 155 Cong. Rec. H14,776 (daily ed. Dec. 11, 2009).

166. Finding ambiguity under *Chevron* step one leads to step two, where most agency actions are upheld. *See* PIERCE, *supra* note 102, at 228 (discussing the low standard imposed by *Chevron* step two).

167. 12 U.S.C. § 5322 (Supp. IV 2010); 31 U.S.C. § 313(e)(5)(A) (Supp. IV 2010).

168. Russello v. United States, 464 U.S. 16, 23 (1983) (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972)) (internal quotation marks omitted).

169. *See* Nat'l Fed'n of Indep. Bus v. Sebelius, 132 S. Ct, 2566, 2583 (2012) ("Congress's decision to label this exaction a 'penalty' rather than a 'tax' is significant because the Affordable Care Act describes many other exactions it creates as 'taxes.' Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally." (citing Russello v. United States, 464 U.S. 16, 23 (1983))); *see also* United States v. Home Concrete & Supply,

those presented by the CFPB's privilege rule. Courts regularly deploy *Russello* presumptions to reverse agency actions under *Chevron* step one.[170]

3. *Russello* Presumption, the Dodd-Frank Act, and Selective Waiver Protection

Analyzing the Dodd-Frank Act under *Russello* shows that Congress did not intend for the CFPB to have selective waiver protection. Within Dodd-Frank, Congress provided one selective waiver provision to protect documents provided to FSOC and the Office of Financial Research.[171] Congress provided another, separate selective waiver provision to protect documents provided to the Federal Insurance Office.[172] Congress provided no such provision for the CFPB. This is a standard *Russello* case; these facts support the conclusion that Congress intentionally omitted a selective waiver provision covering the CFPB. If Congress did not intend for the CFPB to be covered with selective waiver protection, the agency may not promulgate a rule contradicting that intent. Arguably, the CFPB's privilege rule should fail under *Chevron* step one.

4. No Further Evidence of Contrary Congressional Intent

No further indications of contrary congressional intent supporting the CFPB appear in this case. Under these circumstances, courts should hold that congressional intent is clear. Further insistence of possible ambiguity under *Chevron* step one would hinder the goal of giving effect to Congress' will. Justice Thomas identified this problem

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LLC, 132 S. Ct. 1836, 1851 (2012) (Kennedy J., dissenting); Pac. Operators Offshore, LLP v. Valladolid, 132 S. Ct. 680, 688 (2012); Gonzalez v. Thaler, 132 S. Ct. 641, 649 (2012).

170. *See, e.g.*, Garcia-Carias v. Holder, 697 F.3d 257, 264 (5th. Cir. 2012) (citing Russello v. United States to conclude that the Board of Immigration Appeals's interpretation fails under *Chevron* step one); Hanif v. Attorney Gen. of United States, 694 F.3d 479, 486 (3rd Cir. 2012) (citing *Russello* to conclude that Board of Immigration Appeals' interpretation fails under *Chevron* step one); *see also* Luminant Generation Co., L.L.C. v. U.S. E.P.A., 675 F.3d 917, 930 (5th Cir. 2012) (quoting *Russello* to strike down EPA requirement under APA "arbitrary and capricious" standard).

171. 12 U.S.C. § 5322 (Supp. IV 2010).

172. 31 U.S.C. § 313(e)(5)(A) (Supp. IV 2010).

in his dissent in *Negusie v. Holder*.[173] A willingness to find ambiguity in any statutory silence "essentially requires Congress either to obey a judicially imposed clear-statement rule or accept the risk that the courts may refuse to give full effect to a statute's plain meaning."[174] Justice Thomas's concern can be stated as a counterfactual. If Congress genuinely did intend that the CFPB *should not* have selective waiver protection, what could it have written into Dodd-Frank to make that intent clear to a judge that might not accept the *Russello* presumption? Short of including what Justice Thomas calls a "clear statement" (an explicit statement) to the effect that the CFPB shall not have selective waiver protection, it is difficult to imagine what more Congress could do. But it is facially unreasonable to utilize a judicial standard that obliges Congress to enunciate every precise policy that it does or does not want. This very impossibility is the justification for the creation of our vast administrative state.[175]

5. In the Supreme Court, *Russello* will only be Applied under *Chevron* Based on a Precise Comparison.

In terms of *Chevron* analysis in the Supreme Court, the *Russello* presumption has more commonly been found in dissenting opinions.[176] While this does call into question the vitality of the rule, this is more likely an indication that the Court only deploys *Russello* based on precise comparisons where congressional intent is most clear.

In *Entergy Corp. v. Riverkeeper, Inc.*[177] the Court was asked to determine if the EPA's decision to consider regulatory costs and benefits was permitted under a specific provision of the Clean Water Act (CWA). The majority found the EPA's interpretation permissible

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173. Negusie v. Holder, 555 U.S. 511, 550 (2009).

174. *Id.*

175. *See* United States v. Mead Corp., 533 U.S. 218, 229 (2001) ("Congress, that is, may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap. Yet it can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which 'Congress did not actually have an intent' as to a particular result.") (citation omitted).

176. *See, e.g.*, *Negusie*, 555 U.S. 511, (Thomas, J., dissenting); Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 244 (2009) (Stevens, J., dissenting).

177. *Entergy Corp.*, 556 U.S. 208.

under *Chevron* step two. The dissent objected that cost-benefit analysis under this provision had been considered and rejected when the CWA was drafted. The dissent also identified other passages that considered costs and benefits. Citing *Russello*, the dissent argued that Congress clearly did not intend for costs and benefits to be considered under this provision and that the EPA was not permitted to contradict congressional intent.[178]

The *Entergy* case presents a less precise comparison than the provisions relevant to the CFPB's privilege rule. The comparison in *Entergy* is not precise because the cost-benefit issue being litigated is too diffuse.[179] Including the standard being litigated, the CWA provides five different standards that control how the EPA regulates the use of technology to reduce the environmental impact of power plants and other facilities.[180] For the other four standards, Congress provided statutorily defined factors that the EPA was required to consider – cost was addressed in different nuanced ways for each standard.[181] Congress provided no guiding factors for the standard at issue in *Entergy*.[182] Construing this silence as an intentional prohibition would be difficult to interpret and apply because costs and benefits factor into every discretionary assessment.[183] Therefore, a prohibition would be difficult to understand and counts against applying *Russello* in this case.

Additionally, the *Entergy* Court appeared unwilling to apply

178. It is unclear whether *Entergy* was a *Chevron* step one decision. Justice Scalia, writing for the majority, declined to engage in the *Chevron* step one analysis. *Id.* at 217-18. Justice Stevens, dissenting, noted this conspicuous omission and suggested that the majority did not want to confront the possibility that Congress's silence could demonstrate intent under step one. *Id.* at 241 (Stevens, J., dissenting) ("Assuming ambiguity and moving to the second step reflects the Court's reluctance to consider the possibility, which it later laments is 'more complex,' that Congress' silence may have meant to foreclose cost-benefit analysis.") (internal citation omitted). Arguably, Justice Scalia's analysis still conforms to the requirements of *Chevron* step one because it found the provision at issue to be ambiguous. *Id.* at 220.

179. *Id.* at 232 (Breyer, J., concurring).

180. Justice Scalia's majority opinion includes an appendix with a table citing and summarizing these different standards. *Entergy Corp.*, 556 U.S. at 227 app.

181. *Id.* at 221 ("The first four of these tests are elucidated by statutory factor lists that guide their implementation.").

182. *Id.* at 221 ("There is no such elucidating language applicable to the [standard] at issue here.").

183. *Entergy Corp.*, 556 U.S. at 232 (Breyer, J., concurring) ("Any such total prohibition would be difficult to enforce, for every real choice requires a decisionmaker to weigh advantages against disadvantages, and disadvantages can be seen in terms of (often quantifiable) costs.").

Russello because it would require an unreasonable result.[184] Under *Russello*, a partial consideration of costs would be illogical because the statute is completely silent. If the EPA were prohibited from considering costs in any fashion, it could not distinguish between unfeasibly expensive technologies that provide only mildly better environmental protection. Indeed, the EPA could not justify refusing to mandate technologies that would bankrupt entire industries. The Court found this conclusion untenable.[185] The Court will not apply *Russello* to reach an illogical end, especially not where more reasonable conclusions are available.

However, the Court has applied *Russello* in administrative cases where the statutory evidence supports a precise comparison. In *Barnhart v. Sigmon Coal Co., Inc.*,[186] the Court cited *Russello* to conclude that the statutory text unambiguously foreclosed an agency interpretation.[187] The Commissioner of Social Security was tasked with administering a new pension plan for coal miners that had both public and private elements. Interpreting the term "successor in interest" and "related party" the Commissioner assigned 86 miners to the mining company Jericol. This meant that the company would be responsible for pension payments to the miners. Jericol objected and brought suit.

The Court rejected the Commissioner's interpretation and held that successor liability was foreclosed: "Where Congress wanted to provide for successor liability in the Coal Act, it did so explicitly, as demonstrated by other sections in the Act that give the option of attaching liability to 'successors' and 'successors in interest.'"[188] The Court cited specific sections providing for successor liability.[189]

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184. *Id.* at 222 (majority opinion) ("If silence here implies prohibition, then the EPA could not consider any factors in implementing § 1326(b) – an obvious logical impossibility."); *see also id.* at 232 (Breyer, J., concurring) ("Moreover, an absolute prohibition [of considering costs] would bring about irrational results.").

185. *Id.* at 222 (majority opinion); *see also id.* at 232 (Breyer, J., concurring).

186. Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438 (2002).

187. Arguably, this is not a strict *Chevron* case. However, the Court applied *Chevron* step one and cited *Chevron* to reach its conclusions that the interpretation was invalid. *Id.* at 462.

188. *Id.* at 452-53.

189. 26 U.S.C. § 9706(b)(2) (2006) ("If a person becomes a successor of an assigned operator after the enactment date, the assigned operator may transfer the assignment of an eligible beneficiary under subsection (a) to such successor, and such successor shall be treated as the assigned operator with respect to such eligible beneficiary for purposes of this chapter."); 26 U.S.C. § 9711(g)(1) (2006) ("The term 'last signatory operator' shall include

Barnhart presents clear facts to apply *Russello* because successor liability as an issue is discrete and unambiguous. The courts are eminently capable of determining whether a party is a successor in interest. *Barnhart* is directly analogous to the case at hand because the "retention of privilege" provisions that cover FSOC and other new offices created by Dodd-Frank are equally as clear as *Barnhart*'s successor liability provisions.

C. *Selective Omission, Administrative Law, and Policy*

Cases of selective omission strike at the heart of administrative law's rhetorical posture. The delegation doctrine of administrative law is premised on the theory that Congress has neither the time nor the expertise to attend to every policy detail. Congress delegates to agencies like the CFPB to fill in the gaps.[190] But in this case, Congress has demonstrated that it had both the time and the expertise to deploy and enact selective waiver provisions as it saw fit.[191] Thus, it becomes difficult to explain what gap remains to be filled by the CFPB's privilege rule.

VII. CONCLUSION

The legislation passed by the lame duck Congress and signed by the President was necessary to avert a serious risk of civil liability to major banks and financial institutions. Any entity regulated by the CFPB was under threat of losing control of its privileged documents and exposing itself to massive civil actions. While it is possible that the CFPB's rule would have been upheld, the theory challenging the rule's validity is clear enough that it could not be ignored.

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a successor in interest of such operator.").

190. United States v. Mead Corp., 533 U.S. 218, 229 (2001) ("Congress, that is, may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap. Yet it can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which 'Congress did not actually have an intent' as to a particular result.") (citation omitted).

191. 12 U.S.C. § 5322 (Supp. IV 2010); 31 U.S.C. § 313(e)(5)(A) (Supp. IV 2010).